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AUTHOR Kellerman, Ed; Cornelius, Luke
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ABSTRACT

Over the years the Supreme Court has given academic freedom a special First Amendment status. This study reviewed a selected group of recent cases at public universities, focusing particularly on several where rulings were based either on a professor's public comments or in-class verbiage, in an attempt to assess the current status of academic freedom. Cases cited include two where professors were disciplined for views expressed outside the classroom; in both these cases the courts upheld the professors' rights of protected free speech. In two other cases where professors interjected personal religious beliefs during classroom activities, the courts ruled that the university had a responsibility to ensure a secular environment, especially in regard to curriculum. In several "hostile environment" and sexual harassment cases cited, the picture has been mixed, with the rulings usually supporting classroom speech that is germane to course content and not protecting speech that serve no academic function. The paper concludes that given the absence of educational precedents, the courts will continue to apply rulings from cases outside education (such as "Waters v. Churchill"), and suggests that academic freedom can best be protected by self-restraint and the understanding that speech at a higher level carries with it greater responsibility. (Contains 17 references.) (CH)

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Clothing Professors with Immunity: Points of Law on Academic Freedom

Ed Kellerman, Ed.D.
Instructor
Center for Oral and Written Communication Skills
University of Florida, Gainesville, FL

Luke Cornelius
Instructor
Santa Fe Community College
Doctoral Student
Department of Educational Leadership
University of Florida
Gainesville, FL

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Introduction

The freedom of a university or community college professor to present their ideas in and out of the classroom, whether pursuing academic ideas or sharing opinions about the college administration is nearly inviolate. Unless professors exhibit a gross disregard for the curriculum, advocate ideas that are "patently absurd and wholly fallacious...bizarre, shallow, racist, and incompetent pseudo-thinking and pseudo-teaching" (West, 1994, p. 1238) while ignoring proven facts, they are protected by the First Amendment of the U.S. Constitution.

Even if they interfere with university functioning or create an atmosphere of severe intimidation and harassment, their speech in and out of the classroom is generally protected under the First Amendment of the U.S. Constitution. Repercussions from those statements (such as termination or denial of tenure) are subject to the due process standard of the Fourteenth Amendment. In many cases, reinstatement to the college or position and damages have been awarded for the deprivation of liberty, property rights and injury to the reputation of the professor.

This article is not a standard study but a review of several significant cases that have led to the current status of academic freedom for professors in the specific areas of public comments and in-class verbiage. The purpose of this article is not just theoretical but also to provide rulings that apply to situations in which the educational administrator may find themselves. The interaction between the principals in the cases will comprise the "data" of this survey, the courts' rulings will advance our theories of academic freedom, and our knowledge base will be expanded by focusing on particularly controversial remarks regarding racial theories, religious views, sexual metaphors, and profanity.

This is especially important now that technology allows schools to broadcast their courses in media that is viewable by the public. The scope of this study is restricted to public universities and only selected details from the most significant representative cases can be presented in the given space. Cases which started as First or Fourteenth Amendment claims but whose rulings came from technicalities or side issues have been excluded from this survey.

Historical Perspective

Olivas (1993) reports that the idea of academic freedom begins with the concept of Lehrfreiheit which Rudolph (1962) defined as freedom of inquiry, the right to study, and the right to report findings in an atmosphere of consent. The American Association of University Professors (AAUP) currently defines three types of academic freedom: full freedom to pursue research and publication in concert with other academic duties, freedom in the classroom to discuss his or her subject, and the right to speak out on nonacademic issues just as an ordinary citizen.

Throughout the years, the Supreme Court has upheld academic freedom as a "special concern" of the First Amendment (*Keyishian vs. Board of Regents ,1967).* In *Sweezy v. New Hampshire, (1957)* involving a guest professor advocating socialism, Chief Justice Warren wrote that imposing a "straitjacket" on intellectual leaders of colleges and universities would be the real threat to our nation. Justice Douglas extended freedom of speech to the entire university

community including the rights to speak, distribute, receive, read and inquire, think, and teach in a non higher education case,*Griswold v. Connecticut, 1965*, applied to education.

Thus, the 1970s found Stanford University having to defend William Schockley's teaching of his theories concerning the genetic inferiority of blacks and eugenics. Though the university canceled his plans to teach a course on eugenics, in *Furumoto v. Lyman, 1973* , a local judge upheld the university's disciplining of a critical and vocal student group by dismissing their claim that Shockley had to publicly debate them, ruling that their request would be a potential inhibitor of academic freedom (Turner, 1972).

Recent Cases Involving Academic Freedom

In 1988 and 1990, City College of New York professor of philosophy Bernard Levin wrote in two letters to the New York Times, "on average, blacks are significantly less intelligent than whites" and that their success was dependent on making course work easier (Olivas, 1993, p. 1843). The university investigated Levin and then scheduled "shadow" classes Levin's students could attend.

The appeals court upheld the district court's ruling that the university's actions amounted to punishment for his views (which were not expressed in class) and found that the university had violated his academic freedom and abridged Levin's free speech and tenure rights. The creation of an ad hoc committee to investigate Levin's writings, not his conduct, was an unconstitutional attempt to intimidate him into silence by threat of revocation of tenure (violation of First and Fourteenth Amendments). Finally, the court permanently enjoined the college from pursuing disciplinary hearings on Levin's protected free speech in and out of his classes.

Leonard Jeffries was the director of the Black Studies Department at the City College of New York and a tenured professor. On July 20, 1991 in a speech on perceived racial bias in the New York State public school curriculum to the Empire State Black Arts and Cultural Festival of Albany, New York, Dr. Jeffries claimed that rich Jews financed the slave trade, Jews and the Mafia ran the motion picture industry to denigrate blacks, Africa was the birthplace of civilization and Egyptians stole much of the African's contribution, melanin was the causative factor in blacks being the "warm" people while whites were "ice" people which accounted for much of the racial animosity in history, and referred to a colleague as "the head Jew".

Though allowed to retain his professorship, the Board of Trustees removed Jeffries from the chairmanship claiming that his speech threatened recruitment, fundraising, and the college's relationship with the community. A jury found that the subject of the speech was a matter of public concern and did not interfere with CCNY's operation. Therefore, Jeffries rights were violated and the jury returned punitive damages of $375,000 and threw out the Trustees claim of qualified immunity.

The jury foreman later recounted CCNY's presentation of their case as "laughable" - CCNY had claimed that Jeffries' leadership was lacking yet had sent a memo congratulating him on his success and stating explicitly that he would be hired for another three year term as Chair. But on

November 14, 1994, the U.S. Supreme Court set aside these verdicts. They directed the Second Circuit Court of Appeals to reconsider its reinstatement ruling in light of *Waters v. Churchill (1992)* which confirmed that public employees may be subject to dismissal for statements of insubordination, even if later on, those statements are found to be protected under the First Amendment (NY Law Journal, 1994).

A New York Times editorial (1994) summed up the controversy by delineating between Jeffries's rights as a professor and as a department chair. The editors stated "Tenured faculty members should be protected, no matter how unpopular or heinous their utterances. The intellectual vitality of American campuses depends on this essential freedom of expression. But the university does have an equal right to determine who is fit to serve in leadership positions and represent the university's values to the public" (p. A24).

In 1995, Professor Jeffries voluntarily agreed to step down at the end of that year's contract as department chair. He still remains a tenured professor and has reiterated his right to pursue further legal activity. The cases of these two CCNY professors (Bernard Levin and Leonard Jeffries) show that professors may have more academic freedom than administrators and leaders in the college although we have to note that these two cases differ greatly in the additional details, courtroom presentation, and professional backgrounds of the litigants.

Max Lynch, an associate professor of mathematics, read aloud from the Bible after giving students the opportunity to leave the room. Upon notification from Indiana State University officials, he agreed to modify the practice but reneged and continued to spend the first few minutes of each session reading Bible passages.

The Board of Trustees dismissed him and Lynch sued contending that his right to the free exercise of religion was abridged. The Superior Court ruled teacher control over grading, conduct, peer pressure, and disapproval could have a coercive, "chilling" effect on students' religious rights. The college had the right to advise the professor not to consume valuable teaching time by promoting non-secular activities, and they were correct in discharging him after his refusal to cease his religious activities. Finally, the court concluded that "... had ISU permitted Lynch to continue the Bible readings, it would have violated its religious neutrality mandated by the establishment clause of the First Amendment..." (West, 1978, p. 906).

For three years, Philip A. Bishop, assistant professor of Health, Physical Education, and Recreation in the College of Education at the University of Alabama would occasionally interject his religious beliefs into the content of his classes. He did not read passages from the Bible nor lead prayers, but his comments on Christian perspectives reflected his personal bias and beliefs towards the divine origin of human physiology. He also held special Bible study classes during the semester.

He often reiterated that his Christian beliefs were more important to him than academic scholarship. In 1987, Bishop held an optional after hours class meeting entitled "Evidences of God in Human Physiology" which five students and one professor attended.

The university contended that because the class was held just before final exams, it may have had a coercive effect on the the students regarding the Establishment Clause of the U.S. Constitution. Bishop received a memo from his supervisor ordering him to cease the religious portion of his instruction and in response, he petitioned the University President. When they did not rescind the order, he sued the Board of Trustees seeking declaratory and injunctive relief for violation of his right to free speech.

The District Court ruled that the university as an employer and educator can order Dr. Bishop to stop such comments in the classroom on the theory that "under its authority to control curriculum, (they) do not infringe the free speech or free exercise rights of Dr. Bishop (and that the university) seeks to avoid any entanglement of religion" (West, 1991, p. 1078). In these two cases, it is important to note that the courts have ruled that the university has to ensure a secular environment especially when it involves curriculum. A private college or proprietary school has far greater latitude in the curriculum.

Do the following actions create a sexually harassing atmosphere? In 1992, Donald Silva, a professor of technical writing at the University of New Hampshire said to his class: "Focus (in writing) is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects the experience and language. You and the subject become one." and later, "Belly dancing is like Jello on a plate with a vibrator under the plate" (Leatherman, 1994, p. A22).

On the complaints of eight students, the university suspended him without pay for creating a hostile environment and demanded that he undergo psychotherapy as a condition of reinstatement as well as pay for alternate classes for students who wanted out of his class (22 out of 60 students took the alternate class). Silva filed suit in federal district court contending that 22 hours of hearings had violated his First Amendment and due process rights, and reputation. The university filed a motion to dismiss countering that they had handled it with proper procedures.

District Court Judge Shane Devine, until the trial, issued an injunction against the University that reinstated Silva because a) "he was using a legitimate teaching device and exercising his right to free speech", b) students were presumed to have the sophistication of adults, c) "advanced his educational objective...related to subject matter of the course", and d) "were made in a professionally appropriate manner" (Leatherman, p. A22).

The judge also believed that the subsequent trial would find for his First Amendment rights on the basis that students in the class were adults and that he was advancing his educational objectives. Additionally, he accepted Silva's explanation that the term "vibrator" referred to a scalp massager and not a sexual toy. Silva says that he reserves the right to use the "focus is like sex" metaphor but would probably change the in-class example to "focus is like target shooting."

Marsha Texton, a tenured psychology instructor at St. John's River Community College in Palatka, Florida, was found guilty of immorality, misconduct in office, willful neglect of duty by an investigating college board, and was terminated. Specifically, students complained that she

criticized a student's child rearing habits, used the words "penis, ejaculation, and masturbation" in her child psychology and human development class, and advised a student to have an affair with her ex-husband. She also gave a class party where she consumed beer, visited a student's home after midnight with her husband and two other men with beer, and passed out at that student's home after drinking beer.

After termination, the District Court of Appeals ordered her reinstatement finding that

> Ms. Texton's conduct must be judged in the context of her more liberal, open, robust college surroundings. She is not teaching children of tender years in an elementary school. Her acts have little or no connection whatsoever with morality, misconduct in office, or willful neglect particularly when considering that the complainants were junior college students, many of them older and working full time, attending classes part time or at night...She may not be penalized because she has exercised her First Amendment rights in a manner offensive to more delicate sensitivities" (West, 1978, p. 897).

J.D. Martin, an economics instructor at Midland College of Texas stated to his class that "the attitude of this class sucks...the attitude is a bunch of bullshit.....you may think economics is a bunch of bullshit...if you don't like the way I teach this Goddamn course, there is the door" (Mangan, 1986, p. 13). This was not the first time Martin had been warned about using profanity directed to members of the class. After this latest outburst, he was warned both verbally and in writing that suspension and firing might result. He continued to use profanity (supposedly to motivate them), was terminated, and the original jury concluded that his firing was unjustified and awarded him $28,000.

On appeal, the U.S. District court and subsequent federal appeals court ruled that his language, contrary to Martin's claim of First Amendment protection, was not a matter of public concern, had no academic justification, and reversed the original trial's judgment. The reasoning of the court was that "it constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification". Midland College officials had contended that profanity in the classroom was unprofessional and interfered with instruction.

In this case, the appeals court used "a recent Supreme Court ruling *(Bethel School District No. 403 v. Fraser 106 S. Ct. 3159, 92 L.Ed. 2d 549 1986)* against a high school senior who used sexual innuendo before a school assembly". (Mangan, 1986, p. 14). The court found that "sexually explicit and vulgar speech" is not protected by the First Amendment and does not prevent schools from determining "that the essential terms of civil mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech or conduct."

In 1992 during a class on breathalyzer procedures, James Kuboviak, an instructor at the

Texas A & M police academy instructed a female student to try the "Aggie breathalyzer", a standard issue breathalyzer with an artificial penis attached to it (Smith, 1993). The university's investigation found that he had used this device many times (though no one had ever complained), occasionally laid a huge, black artificial penis on his desk, and showed explicit films of topless women in class.

Kuboviak claims that his activities were solely to decrease boredom during the long hours of the class and were merely practical jokes. The Dean's investigation revealed that several women had been offended and had been made the object of the jokes, however they did not see a reason to terminate or penalize Kuboviak.

Dr. G. K. Bennet, A&M's director and deputy chancellor for engineering said he considered the jokes in bad taste but "I about fell off my chair when I heard about it" (p. 1). New guidelines about sexual harassment have been issued and Smith was warned that if he used these props again, he would be terminated.

In 1976, University of Florida Professor of Philosophy Kenneth Megill was denied tenure after his six years of tenure track contracts. In the suit, Megill contended that he was being punished for his speech that was protected under First and Fourteenth Amendments, despite a five day, 1700 page transcript of his hearing. The transcripts revealed six revealing incidents.

1. In Philosophy 365, without obtaining permission, he combined with another course. They were identical courses but listed separately in the catalog. Students who took both, had to do the work for only one course yet received the double credit. He did not adequately supervise, had no effective way of evaluating classwork, and all but eight of 257 students received A's and B's. He claimed that his teaching style was protected speech.

2. In Jacksonville, Megill accompanied President O'Connell to a meeting where the President defended Megill's right to make controversial statements. After the meeting, Megill held a press conference where he intimated that police brutality and political meddling were common at Florida universities and that the UF was an authoritarian institution. The Regents found that he made "untrue and misleading public statements."

3. Marshall Jones, another black UF professor, was denied tenure. Megill not only criticized the decision but stated that Dr. O'Connell was "dangerous and is under no control from the people who live and work at this university-absolute power. And he uses it arbitrarily...as he did in my case, as he did with Jones, as he did with Canney." The Regents found these statements to be misleading as O'Connell was not involved in the Jones decisions and that "he had failed to investigate his facts before making the comment, a task thought to be relatively easy".

4. At a 1969 speech to the Yale Club in Gainesville, a panel discussion about student dissent (where Megill was an audience member) was disrupted by Megill's frequent use of profanity and an offensive slang word which caused the meeting's termination. The Board "determined that Dr. Megill's conduct and profanity lacked the maturity and discretion of a qualified member of the academic community and concluded that his disruption of the meeting in such an

anti-intellectual manner impeded his usefulness as a teacher."

5. After the killings at Kent State, Megill participated in an open meeting to discuss the shootings. Biggs, the university's attorney and another administrator entered and Megill announced to the crowd that the "administrative spies" had arrived. Megill, to the audience, characterized Biggs's participation in a case they were currently involved in inaccurately, a fact he admitted to later on. The district court agreed with the hearing examiner that erroneous statements are not protected speech.

6. In his appearance before the Board of Regents in 1972 as president of the faculty union, Megill opposed new rules concerning the evaluation of tenured faculty. He asserted that the Council of Presidents had adopted this rule without consulting the faculty who would be affected by these activities. Upon O'Connell's refutation, Megill claimed that his use of the term "consultation" was "in the sense of union semantics." It had been reviewed by the Faculty Senate as well as the Academic Freedom and Tenure Committee, the Professional Relations Committee, and the AAUP.

The Board "looked to Megill's inability to make accurate public statements concerning university affairs rather than the fact that he made public statements." In each of these incidents, "the Board found either that Megill made false and inaccurate statements to the public or that his conduct demonstrated a lack of professional maturity...a lack of character and intellectual responsibility needed for a tenured professor." In balancing the First Amendment rights of Megill against the interests of the Regents', the District Court ruled in favor of the Regents on all counts.

> The Board of Regents maintains a strong interest in retaining only those professors possession the qualities of character that accentuate the high standards of the teaching profession. The First Amendment protects the right to make a statement. It does not, however, clothe a person with immunity when his statements are shown to be false and inaccurate, when their truth could be easily obtained. (West, 1977, p. 1085).

Conclusion

There was a time when the occasional negligence suit was all a college administrator had to worry. Courts are being forced to consider a wider variety of lawsuits on interpretations of behavior in higher education though judges are still reluctant to rule on curriculum and classroom activities. In the absence of educational precedent on issues of tenure, academic freedom, they continue to apply rulings from cases outside the education field such as the most recent Churchill v. Waters (a nursing facility) and as long ago as Griswold v. Connecticut (a privacy case of couples making birth control decisions).

As shown in the above reviews of case law, classroom statements that are germane to the course content (as in *Levin*) are protected as free speech. Comments that serve no academic function (as in *Martin*) are not protected. Comments that are relatively factual and are matters of public concern are protected yet inaccurate statements that may harm the legitimate functions of the university (as in *Megill*) may be punishable, especially when accompanied by poor behavior.

As a result of this selected review of cases and the recent *Waters v. Churchill* citation by the Supreme Court, the theoretical extension of academic freedom revolves around speech and behavior. In the past, Supreme Court Justice Potter may have been right about not being able to define pornography but knowing it when he saw it, was analogous to the concept of academic freedom. The inability to define pornography had protected almost all the most vile depictions under First Amendment freedoms. The inability to define academic freedom, as guided by *Tinker v. Des Moines* ("the right of students does not end at the schoolyard gate") had protected extreme behavior and had been the guiding light for constitutional protections for all of the academic community, but in this era, dismissals for unorthodox views accompanied by poor behavior as in *Megill*, *Lynch*, and *Martin* would be supported on appeal in light of *Waters v. Churchill* and *Jeffries v. Harleston* .

There are many who believe Leonard Jeffries should have been fired for poor classroom and professional behavior long before his infamous speech in Albany. However, the Trustees waited until then, then argued unsuccessfully that it was his behavior and the speech and not the speech alone as Jeffries had contended. Up until the Supreme Court sent the case back down last year to the lower court for reconsideration in light of *Waters v. Churchill*, the speech and the behavior had been protected.

The AAUP believes that professors have an absolute right to fully and freely pursue teaching, research, and extracurricular speech. However, the AAUP recognizes that professors may be held accountable for their actions and the courts may impose some restrictions on the totality of free expression. "Faculty and students have a great amount of elbow room in class," writes Olivas (1993), "and a self imposed code of professorial teaching conduct is no great loss of autonomy or essential authority" (p. 1858). The authors of this paper also believe that college administrators and leaders have been duly warned by. Speech at a higher level carries with it greater responsibility.

An interesting related issue comes up. Self restraint is especially important now that courses broadcast over televised media can be viewed by the general public. What may happen if a course broadcast from Berkeley, California was deemed unsuitable by a local county or city prosecutor? Given the current political climate, it would not be surprising to see prosecution for obscenity, prurient, or inflammatory content .

These prosecutorial claims will most likely not hold up in court, however, self restraint may quell a nasty and polarizing issue. Higher academia is under enough fire and the last issue an administrator should have to defend is an academic freedom incident that has become public. After all, to paraphrase Donald Silva, though it was his right to use the sexual metaphor, perhaps there was another phrase ("focus is like skeet shooting") that was just as descriptive and not as offensive.

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